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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DAVID WAYNE PATE, Appellant.	2 CA-CR 2008-0297 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200800026

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 After a jury trial, David Pate was convicted of aggravated driving under the influence of an intoxicant (DUI) with a suspended driver's license and aggravated DUI with an alcohol concentration of .08 or more with a suspended license. The trial court placed him on five years' probation and ordered him to serve four months in prison as a condition of his probation. On appeal, Pate argues the court erred by denying his motions to suppress evidence resulting from a vehicle stop and a blood draw he contends were unconstitutional. He also contends the court erred by granting the state's motion to preclude him from introducing at trial the educational records of the state's expert witness. For the reasons discussed below, we affirm.

Factual and Procedural Background

¶2 "In reviewing a motion to suppress, we consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the trial court's factual findings." *State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008). On November 12, 2005, at approximately 1:00 a.m., Cochise County sheriff's deputy Allison Hadfield was dispatched to a bar in Hereford in response to a report of a fight in progress. En route to the bar, she was notified by her dispatcher that the suspect had left the bar in a white truck and was driving north on State Route 92 toward Sierra Vista. Hadfield observed a truck like the one described traveling north on Route 92, four or five miles from the bar, and pulled it over. She identified the driver as Pate from his driver's license. She noticed a strong odor of alcohol and observed that Pate's eyes were red and watery, his speech was slurred, and his balance was impaired. After Pate refused to perform field sobriety tests,

Hadfield arrested him and transported him to a sheriff's substation. There, Pate twice refused to submit to tests to determine his alcohol concentration, so Hadfield obtained a search warrant for a blood sample. With the help of another officer, she restrained Pate, who was not cooperating, and drew a sample of his blood. The sample was ultimately analyzed by a Department of Public Safety (DPS) criminalist.

¶3 Before trial, both parties filed motions to preclude evidence. Pate moved to suppress all evidence arising from the stop of his vehicle, which he argued constituted an illegal seizure. He also moved to suppress the blood evidence, contending it was the result of an unconstitutional blood draw. The state's motion sought to preclude Pate from introducing any evidence regarding "the grades, transcripts or any other educational records of [the] DPS Criminalist" who was to testify as an expert witness, arguing they were irrelevant and had been improperly released by the college. After a hearing on all three motions, the court denied Pate's motions and granted the state's motion in part, limiting evidence of the criminalist's grades to relevant courses from 1996 on. Pate was convicted and sentenced as noted above.

Discussion

Vehicle Stop

¶4 First, Pate argues the trial court erred in denying his motion to suppress because the stop of his vehicle was illegal. He contends the deputy lacked "reasonable suspicion that he was committing a crime or probable cause to believe that he had violated a traffic law." "[T]he forced stop of an automobile without at least articulable suspicion of criminal activity

is an unconstitutional seizure under the Fourth Amendment." *State v. Richcreek*, 187 Ariz. 501, 505, 930 P.2d 1304, 1308 (1997). However, such a stop is constitutional if "an assessment of the whole picture . . . raise[s] a suspicion that the particular individual being stopped [has been] engaged in wrongdoing." *United States v. Cortez*, 449 U.S. 411, 418 (1981). To satisfy this "reasonable suspicion" standard, "the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *United States v. Arvizu*, 534 U.S. 266, 274 (2002).

¶5 "Although we review de novo whether the police had reasonable suspicion to justify an investigatory stop, we defer to the trial court's findings of fact and 'give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.'" *Fornof*, 218 Ariz. 74, ¶ 5, 179 P.3d at 956, *quoting Ornelas v. United States*, 517 U.S. 690, 699 (1996) (citation omitted). Here, Hadfield testified she had received a report of a bar fight in progress, apparently originating from "someone who worked at the bar." "[D]ue to the potential for bodily harm," she activated the emergency lights and sirens on her patrol car and proceeded to the bar. A few minutes later, her dispatcher notified Hadfield of a further report "that the suspect had left in a white dually[1] pickup truck headed towards Sierra Vista northbound on State Route 92." Hadfield was still traveling south on Route 92 when her sergeant, who was ahead of her on Route 92, radioed her that a truck matching the

[1]A "dually" is a truck with four wheels on the rear axle.

description had just passed him, traveling north. When Hadfield saw the white dually truck, the only such vehicle she had encountered, she made a U-turn and stopped the truck.

¶6 Because Hadfield had not been provided with any further description of the truck, such as its make and model or license plate number, we agree with the trial court that she "probably [did] not" have probable cause or proof by a preponderance of the evidence that its occupant had been involved in criminal activity. But we disagree with Pate that the "description provided to law enforcement . . . was insufficient[] . . . to justify the stop of the vehicle." Given the report of the bar fight and the trial court's finding that, "at a few minutes after 1 a.m. there probably weren't a huge number of white dually trucks that were headed north on [Route] 92 in circumstances such that a few minutes before it could well have begun at [the bar]," the court did not err in concluding that Hadfield had reasonable suspicion to stop Pate's truck.[2]

Blood Draw

¶7 Next, Pate argues the trial court erred in denying his motion to suppress based on an unreasonable blood draw. The Fourth Amendment guarantee against unreasonable searches and seizures is violated when a defendant's blood is drawn in an unreasonable manner. *State v. May*, 210 Ariz. 452, ¶¶ 5-6, 112 P.3d 39, 41 (App. 2005). And in assessing

[2]We are also unpersuaded by Pate's argument that Hadfield lacked reasonable suspicion to make the stop because the report of the incident at the bar was unreliable. Although defense counsel asked Hadfield if it were possible that an intoxicated person could have had a grudge and reported a made-up incident, Hadfield testified she believed the reporting party "was someone who worked at the bar." Without actual evidence to support the hypothetical Pate posed, the trial court was not bound to consider any contrary scenario that was based on sheer speculation.

whether a particular seizure is reasonable, we balance "'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989), *quoting Tennessee v. Garner*, 471 U.S. 1, 8 (1985).[3]

¶8 On appeal, Pate argues only that the blood draw was unreasonable because Hadfield was not qualified to conduct it.[4] "If blood is drawn under § 28-1321, only a physician, a registered nurse or another qualified person may withdraw blood for the purpose of determining the alcohol concentration or drug content in the blood." A.R.S. § 28-1388(A). A police officer who can "'demonstrate competence through training or experience'" in phlebotomy is a "qualified person" pursuant to the statute. *May*, 210 Ariz.

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[3]Although Pate also invokes article II, § 8 of the Arizona Constitution, he does not argue that its protections are more extensive than those afforded by the Fourth Amendment; indeed, he provides no separate argument or authority with respect to any claims under article II. We therefore confine our analysis to his Fourth Amendment argument. *See State v. Nunez*, 167 Ariz. 272, 274 n.2, 806 P.2d 861, 863 n.2 (1991).

[4]Pate also argued below that the blood draw was unreasonable because the procedure used was not "medically approved," the chair he sat in "was not cleaned prior to the procedure," and one of the officers "used force to hold [his] arm down on the . . . armrest." However, he has apparently abandoned these arguments on appeal. *See State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) (failure to argue claim constitutes abandonment). In any event, he fails to provide any facts that would distinguish the present case from *State v. Clary*, 196 Ariz. 610, ¶¶ 2, 15, 2 P.3d 1255, 1256, 1258 (App. 2000) (upholding officers' restraint of defendant on floor during blood draw, given seriousness of aggravated DUI and threat to officers' safety posed by active resistance), and *May*, 210 Ariz. 452, ¶ 8, 112 P.3d at 45 (upholding blood draw performed while defendant rested arm on trunk of patrol car, given officer's awareness of need to clean defendant's arm and avoid injuring him).

452, ¶ 10, 112 P.3d at 42, *quoting State v. Carrasco*, 203 Ariz. 44, ¶ 9, 49 P.3d 1140, 1141 (App. 2002).

¶9 Although Pate concedes Hadfield had "attended a standard venipuncture course provided to law enforcement officers," he argues that neither this nor her certification were sufficient to "make her qualified pursuant to A.R.S. § 28-1388(A)" because she had "performed only seven blood draws in 2005." He also asserts "the Cochise County Sheriff's Office had no internal program to insure that those officers who had attended venipuncture training were maintaining proficiency, and no set policy for the proper method of performing a blood draw." He further contends the fact that an individual is a "qualified person" pursuant to § 28-1388(A) merely creates a presumption that may be rebutted by evidence that such an individual is not, in fact, competent to draw blood. Assuming, without deciding, that § 28-1388(A) merely creates a rebuttable presumption that an individual is qualified, Pate presents no facts suggesting Hadfield drew his blood in an incompetent or otherwise unreasonable manner and thus violated his Fourth Amendment rights. *See Graham*, 490 U.S. at 396; *State v. Clary*, 196 Ariz. 610, ¶¶ 37-38, 2 P.3d 1255, 1261 (App. 2000) (upholding blood draw while officers restrained defendant on floor). Thus, the trial court did not err in denying Pate's motion to suppress the evidence obtained from his blood sample.

Expert Qualifications

¶10 Finally, Pate argues the court erred in precluding evidence that the state's expert witness, a DPS criminalist, had failed college courses in chemistry, mathematics, and trigonometry prior to 1996. "Decisions on the admission and exclusion of evidence are 'left

to the sound discretion of the trial court,' . . . and will be reversed on appeal only when they constitute a clear, prejudicial abuse of discretion." *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994), *quoting State v. Murray*, 162 Ariz. 211, 214, 782 P.2d 329, 332 (App. 1989). Although criminal defendants have a fundamental constitutional right to present a defense and confront witnesses, the right is limited by ordinary evidentiary rules and does not extend to presenting evidence which is irrelevant or unduly prejudicial. *State v. Dickens*, 187 Ariz. 1, 14, 926 P.2d 468, 481 (1996); *State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988).

¶11 Evidence offered to impeach a witness must be relevant and admissible. *See State v. Allen*, 140 Ariz. 412, 414, 682 P.2d 417, 419 (1984). Pursuant to Rule 401, Ariz. R. Evid., evidence is relevant when it has a tendency to prove or disprove a material fact at issue. *See Allen*, 140 Ariz. at 414, 682 P.2d at 419. And it is admissible if, inter alia, its probative value is not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, [or] waste of time." Ariz. R. Evid. 403.

¶12 "The threshold for relevance is a low one." *State v. Roque*, 213 Ariz. 193, ¶ 109, 141 P.3d 368, 396 (2006). Furthermore,

> when an expert offers his opinion he exposes himself to a different type of inquiry on cross examination than would be permitted of the ordinary factual witness. He invites investigation into the extent of his knowledge and the reasons for his opinion . . . [and] may be subjected to the most rigid cross examination concerning his qualifications and the sources of his opinion.

State ex rel. Herman v. Saldamando, 12 Ariz. App. 474, 475, 472 P.2d 85, 86 (1970). However, the court in *Saldamando* concluded that cross-examination on collateral matters that had "no bearing on [an expert's] competency" could properly be foreclosed on relevance grounds. *Id.* Thus, for example, when a medical witness testified he was on the staff of two hospitals, the trial court properly excluded "'wholly collateral'" testimony that he had failed to obtain a staff position at a third. *Id.*, *quoting Tellefsen v. Key Sys. Transit Lines*, 322 P.2d 469, 470 (Cal. Ct. App. 1958).

¶13 Here, the criminalist testified she had started college in 1989 and had initially failed some courses because she was "immature . . . [and] took on a lot that [she] . . . wasn't ready for." She left college after three or four semesters but returned in 1996 and graduated in 2001. It was undisputed that she had ultimately passed all the courses necessary to earn her chemistry degree. Furthermore, her expertise was grounded not only in her degree, but also in her experience as a chemist in the private sector, three months of training by DPS, and her analyses in approximately 1,500 blood alcohol cases since becoming employed by DPS. Thus, the fact she had failed some courses in her first few semesters at college over twelve years earlier was of marginal relevance at best.

¶14 Moreover, even if the evidence of the criminalist's early course failures met the low threshold for relevance, the trial court could properly have excluded it under Rule 403. The goal of this rule, noted above, is to avoid the danger that, "in attempting to dispute or explain away the evidence thus offered, new issues will arise . . . and the multiplicity of minor issues will be such that the jury will lose sight of the main issue." *State*

v. Gibson, 202 Ariz. 321, ¶ 17, 44 P.3d 1001, 1004 (2002), *quoting* Joseph M. Livermore et al., *Arizona Law of Evidence* § 403, at 86 (4th ed. 2000). When the probative value of the evidence is minimal, there is a greater probability that factors of confusion or waste of time will substantially outweigh its value. *See id.* Here, evidence of the criminalist's failing grades would have led, as it did during the suppression hearing, to explanations for her apparently misspent early years at college and inquiries about particular courses and their applicability to her current work. The trial court therefore did not err in excluding evidence of her academic performance before 1996. *See State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982) ("The court may prevent cross-examination into collateral matters of a personal nature having minor probative value and tending to bring up [further] collateral matters . . . which would require unnecessary use of court time.").

Disposition

¶15 For the reasons stated, we affirm Pate's convictions and sentences.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge